UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

and

STATE OF MINNESOTA, by its Attorney General Hubert H. Humphrey, III, its Department of Health, and its Pollution Control Agency

Plaintiff-Intervenor,

v.

REILLY TAR & CHEMICAL CORPORATION; HOUSING AND REDEVELOPMENT AUTHORITY OF ST. LOUIS PARK; OAK PARK VILLAGE ASSOCIATES: RUSTIC OAKS CONDOMINIUM INC.; and PHILIP'S INVESTMENT CO.,

Defendants.

and

CITY OF ST. LOUIS PARK,

Plaintiff-Intervenor,

v.

REILLY TAR & CHEMICAL CORPORATION,

Defendant.

and

CITY OF HOPKINS,

Plaintiff-Intervenor,

v.

REILLY TAR & CHEMICAL CORPORATION,

Defendant.

Civil No. 4-80-469

STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF UNITED STATES' MOTION TO QUASH REILLY TAR & CHEMICAL CORPORATION'S DEMAND FOR A JURY TRIAL

Plaintiff United States of America moves this Court to quash defendant Reilly Tar & Chemical Corporation's ("Reilly") demand for a jury trial as to the claims for relief brought by the United States. In this action, the United States is suing Reilly under section 7003 of the Resource Conservation and Recovery Act ("RCRA") 42 U.S.C. §6973 ("RCRA §7003") and section 106(a) the Comprehensive Environmental Response, Compensation and Liability Act of 1980 42 U.S.C. §9606(a) ("CERCLA §106(a)") seeking injunctive relief against the disposal and release of hazardous wastes and substances at the site of Reilly's former tar refinery and wood treating plant in St. Louis Park, Minnesota. The United States is also suing Reilly under CERCLA §107(a)(1)(A) & (2)(A) for the restitution of costs incurred by the United States in response to the threatened or actual release of pollutants or contaminants. Since the relief sought by the United States -- an injunction and restitution -- is equitable in nature, Reilly has no right to a jury trial under the Seventh Amendment which only provides for jury trials in actions at common law. Accordingly, Reilly's jury demand should be quashed as to the claims for relief raised by the United States.

I. Because the United States Has Raised Only Equitable Claims for Relief, the Seventh Amendment Does Not Entitle Reilly to a Jury Trial on those Claims

Although the Seventh Amendment establishes a right to a jury trial in civil actions "at common law," the Supreme Court has never applied the Seventh Amendment to cases in which one party has raised purely equitable claims against another. See Ross v. Bernhard, 39 U.S. 531 (1970); Katchen v. Landy, 382 U.S. 323 (1966);

Dairy Queen, Inc. v. Wood, 396 U.S. 469 (1962). As the Eighth Circuit stated in Klein v. Shell Oil Co., 386 F.2d 659, 662-63 (8th Cir. 1967):

> "none of these cases, or others pertinent to the jury trial issue, insures the right to a jury trial where, as here, purely equitable, as distinquished from legal, or a combination of legal and equitable relief is sought."

In Ross v. Bernhard, supra, the Supreme Court stated that the legal or equitable nature of a claim for relief is determined

> "by considering, first pre-merger [of law and equity] custom with reference to such question, second, the remedy sought, and the practical limitations of juries." 396 U.S. at 538 n. 10.

Under this standard, the first two factors are generally unified, since pre-merger custom or analogy to pre-merger custom is indicative of the nature of the "remedy sought." Thus, the principal touchstone which the courts have used in deciding whether there is a right to a jury trial is to determine whether the remedy sought is legal or equitable in nature.

A. Injunctive Relief under RCRA §7003 and CERCLA §106(a)

Using the Supreme Court's touchstone, none of the claims raised by the United States against Reilly in this action are legal in nature. The remedy which the United States has asked for against Reilly under RCRA §7003 and CERCLA §106(a) is an injunction. RCRA §7003 provides in pertinent part:

> "Notwithstanding any other provision of this Act, upon receipt of evidence that the handling, storage, treatment, transportation or disposal of any solid wastes or hazardous waste may present an imminent and substantial endangerment to health or the

> environment, the Administrator may bring suit on behalf of the United States in the appropriate district court to immediately restrain any person contributing to such handling, storage, treatment, transportation, or disposal to stop such handling, storage, treatment, transportation, or disposal to to take such other action as may be necessary."

The very use of the words "immediately restrain" and "take other action as may be necessary" in RCRA §7003 clearly indicates that an action under section 7003 is one for injunctive relief. Section 7003, has been generally interpreted as authorizing actions for injunctive relief. United States v. Price, 688 F.2d 204 (3d Cir. 1982); United States v. Solvents Recovery Service, 496 F. Supp. 1127 (D. Conn. 1980); United States v. Vertac Chemical Corp., 489 F. Supp. 870 (E.D. Ark. 1980); United States v. Midwest Solvents Recovery, 484 F. Supp. 138 (N.D. Ind. 1980).

CERCLA §106(a) reads in pertinent part:

> "In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require."

Section 106(a) authorizes actions "to secure such relief as may be necessary to abate such danger or threat," and empowers the court "to grant suich relief as the public interest and the equities of the case may require." This language clearly invokes the equitable powers of the court, and specifically the equitable remedy of an injunction.

The Supreme Court has held that an injunction is an equitable remedy for which there is no right to a jury trial under the Seventh Amendment in United States v. Louisiana, 339 U.S. 669 (1950). There the Court stated:

> Louisiana's motion for a jury trial is denied. We need not examine it beyond noting that this is an equity action for an injunction and an accounting. The Seventh Amendment and the statute ... are applicable only to actions at law." 339 U.S. at 706.

B. Restitution under CERCLA §107(a)(1)(A) & (2)(A)

The other remedy which the United States is seeking in this action is reimbursement of funds expended to investigate and respond to the release or threatened release of hazardous substances, pollutants and contaminants created by Reilly's operations at the St. Louis Park site. Section 104 of CERCLA, 42 U.S.C. §9604, authorizes the United States to take response and remedial actions, consistant with the National Contingency plan when hazardous substances, pollutants or contaminants are released or threaten to be released into the environment. CERCLA §107(a)(1)(A) & (2)(A) permits the United States to sue responsible parties to recover the costs of investigation or removal or remedial action taken under section 104. CERCLA §107(a)(1)(A) & (2)(A) provides:

> "(a) Notwithstanding any other provision or rules of law, and subject only to the defenses set forth in subsection (b) of this section-
> (1) the owner and operator of ... a facility,
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of...
> from which there is a release, or threatened

> release which causes the incurrance or response costs, of a hazardous substance, shall be liable for ...
>
> (A) all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan;"

The remedy provided for in CERCLA §107(a)(1)(A) & (2)(A) is in the nature of restitution or quantum meruit. CERCLA §107(a)(1)(A) & (2)(A) permits the United States to sue to recover from responsible parties the costs of actions taken to remove or remedy the release or threatened release of hazardous substances, pollutants and contaminants into the environment. Thus, under those provisions, the United States seeks to be reimbursed by Reilly for the costs it incurred in responding to the release or threatened release of hazardous substances by Reilly.

The restitution remedy under section 107(a)(1)(A) & (2)(A) differs from damages, the traditional monetary remedy available in actions at law. Damages are calculated in contract law to reflect the expectation interest of the plaintiff under the contract. In tort law, damages are calculated to compensate plaintiff for an injury to the plaintiff's person or property. But under section 107(a)(1)(A) & (2)(A), the recovery is measured by the actual amount of money expended, not by the injury to any property. Section 107(a)(1)(A) & (2)(A) permits the United States to recover monies expended to monies expended to protect the public health and environment from threats of endangerment caused by defendant's conduct. The Fourth Circuit explained the difference between restitution and damages in United States v. Long, 537 F.2d 1151, 1153-54 (4th Cir. 1975); cert denied, 429 U.S. 871 (1976):

> "The distinction as we see it, is that '[a] person obtains restitution when he is restored to the position formerly occupied, either by the return of something which he formerly had or by the receipt of its equivalent in money.' Restatement of Restitution §1, comment a, at 12. Damages on the other hand, are determined by reference to the loss sustained by a victim as the result of the wrongful conduct on the part of another."

Here, the United States is not suing for compensation for an injury which the United States itself sustained at Reilly's hands, but rather to be restored to the position it was in before it spent funds to respond to a danger to public health.

A close parellel to the United States' right of recovery under section 107(a)(1)(A) & (2)(A) is the United States' right of action to recover from the responsible party the costs of removing a sunken object under the River and Harbors Act of 1899, 33 U.S.C. §401 et seq. Under both statutes, the United States may sue to recover costs incurred in protecting the public from a potential danger caused by defendant's conduct. In describing the United States' right of recovery for costs incurred in removing a sunken obstacle under the Rivers and Harbors Act, the Supreme Court in Wyandotte Transportation Co. v. United States, 389 U.S. 191, 204 (1967), cited Restatement of Restitution §115. The Sixth Circuit in United States v. Boyd, 520 F.2d 642, 644-45 (6th Cir. 1975), cert. denied, 423 U.S. 1050 (1976), further elaborated on this point, by describing the principles of restitution as the "basis for recovery" for costs incurred in removing sunken obstacles. The Boyd court went on to quote the same Restatement of Restitution §115, on which the Supreme Court relied in the Wyandotte case:

> "A person who has performed the duty of another by supplying things or services, although acting without the other's knowledge or consent, is entitled to restitution from the other if
>
> (a) he acted unofficiously and with intent to charge therefor, and
> (b) the things or services supplied were immediately necessary to satisfy the requirements of public decency, health, or safety."

Here, under CERCLA §107(a)(1)(A) & (2)(A) the United States is seeking to recover the value of services which were spent to perform duties for which Reilly Tar was responsible and which were "necessary to satisfy the requirements of public decency, health or safety."

Although actions seeking monetary relief are generally legal in nature, "not all forms of monetary relief can be characterized as 'legal' relief." Grayson v. Wickes Corp., 607 F.2d 1194, 1196 (7th Cir. 1979), citing Curtis v. Loether, 415 U.S. 189, 194 (1974); see United States v. Price, 688 F.2d 204 (3d Cir. 1982). In particular, the federal courts have routinely viewed restitution as an equitable remedy calling for monetary relief. Porter v. Warner Holding Co., 328 U.S. 395, 402 (1946) ("Restitution which lies within [the court's] equitable jurisdiction ... differs greatly from the damages."; United States v. Long, 537 F.2d 1151, 1153 (4th Cir. 1975), cert denied, 429 U.S. 871 (1976) ("a court of equity may, and often does, award monetary relief in the form of restitution in order to establish justice in a given case."); Rogers v. Loether, 467 F.2d 1110, 1121 (7th Cir. 1972); aff'd sub nom. Curtis v. Loether, 415 U.S. 189 (1974) ("Restitution is clearly an equitable remedy."); United States v. Cowen's Estate, 91 F. Supp. 331, 332 (D. Mass. 1950).

Accordingly, the two remedies which the United States seeks against Reilly -- injunctive relief under RCRA 7003 and CERCLA §106(a) and restitution under CERCLA §107(a)(1)(A) & (2)(A) -- are both equitable in nature. Therefore, Reilly has no right to a jury trial under the Seventh Amendment with respect to the claims brought by the United States.

II. The Presence of Plaintiff-Intervenors in this Suit Does Not Entitle Reilly to a Jury Trial Against the United States

The presence of plaintiff-intervenors State of Minnesota, City of St. Louis Park and City of Hopkins in this case does not entitle Reilly to a jury trial against the United States, even assuming that the plaintiff-intervenors have raised legal claims. The effect of consolidation of cases brought by different parties should not have the effect of creating rights that did not previously exist or cause the loss of rights which did exist. As Professor Moore stated, "merger is never so complete in consolidation as to deprive any party of any substantial rights which he may have possessed had the actions proceeded separately. The actions retain their separate identity, and the parties and pleadings in one action do not automatically become parties and pleadings in the other action." 5 J.W. Moore, Federal Practice, ¶42.02[3] at 42-28-29 (2d ed. 1982). The Supreme Court stated in Mutual Ins. Co. v. Hillmon, 145 U.S. 285, 293 (1892), "although [the parties] might be lawfully compelled, at the discretion of the court, to try the cases together, the causes of action remained distinct, and required separate verdicts and judgments; and no defendant could be deprived, without its consent, of any right material to its defense ... to which it

would have been entitled if the cases had been tried separately." Here, the United States should not be deprived of the opportunity to present its equitable claims to the court in a bench trial because intervening plaintiffs may have legal claims against the same defendant.

Although the Supreme Court in Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959), has held that where both legal and equitable issues exist between two parties, the common questions of fact should be tried to a jury, Beacon Theatres did not involve a situation where solely equitable issues existed between two parties and a third party intervened to add a legal issue. The rationale behind the Beacon Theatre principle -- that questions of fact common to legal and equitable claims which exist between two parties should be tried to a jury -- was that if one allowed these questions to be tried to the court in equity first, the court's decision on the equitable claim would have a res judicata effect on the legal issue before it could go to a jury. See Beacon Theatres, Inc. v. Westover, supra, 359 U.S. at 504 ("if Beacon would have been entitled to a jury trial in a treble damage suit against Fox it cannot be deprived of that right merely because Fox took advantage of the availability of declaratory relief to sue Beacon first"). This rationale makes perfect sense where both legal and equitable claims exist between the same two parties, but it is inapplicable when solely equitable claims exist between two parties and a third party interevenes to raise a legal claim against one of them.

If the trial court in Beacon Theatres v. Westover had separately tried plaintiff Fox's claim for a declaratory judgment that it had not violated the antitrust laws, the resolution of that issue would have had a res judicata effect on defendant Beacon's legal counterclaim that Fox was liable to it for violating the antitrust laws without a jury having heard the evidence. But here if the United States' equitable claims against Reilly were tried without a jury, the resolution of those issues would not have a res judicata effect on a legal claim brought by one of the intervening plaintiffs, such as negligence, because that question involves different parties. Accordingly, the fact that the State and the two cities have intervened with possible legal claims, does not alter the crucial fact that the issues to be decided between the United States and Reilly are solely equitable and thus does not entitle Reilly to a jury.

To rule that the right of a jury trial against a plaintiff who had raised solely equitable claims could be altered by the presence or absence of intervenors, would focus the question of a right to a jury trial on the identity of the parties, not the nature of the issues. See Ross v. Bernhard, supra, 396 U.S. at 538. If this approach were followed, then Reilly's right to a jury trial against the United States could shift in and out of existence, depending on the actions of the third parties, even though the underlying issues between the United States and Reilly remained purely equitable. Under this approach, Reilly would have had no right to a jury trial when the United States filed suit against Reilly, seeking only equitable relief, but as soon as another

plaintiff intervened with a potential legal claim against Reilly, Reilly would have instantaneously acquired a right to a jury trial against the United States, even though the underlying issues between Reilly and the United States had not changed. If the intervening plaintiffs were later to drop their claims characterized as legal, or settle their lawsuit with Reilly before trial, or if the court were to sever the actions brought by the intervenors, suddenly Reilly would loose its right to a jury trial against the United States, although the issues between the United States and Reilly would not have been altered. Thus, under this approach, the question whether Reilly had a right to a jury trial against the United States would depend on who else was a party to the lawsuit at the time of trial, even though the United States' claims against Reilly were unchanged in character since the time of filing.

Accordingly, this approach must be rejected. The rule of Beacon Theatres, Inc. v. Westover was clearly intended to apply to situations where there are legal and equitable issues between the same two parties and not where there are solely equitable claims between two parties and a third party interevenes to raise a legal claim. Reilly's right to a jury trial against the United States cannot spring in and out of existence, depending on the actions of intervenors.

III. Trial to Court of the United States' Equitable Claims against Reilly Would Promote the Orderly Resolution of Issues in this Case

Trial to the court of the United States' claims against Reilly would result in a more orderly resolution of the issues in this case and reduce the potential that issues might be confused

in the minds of the jury. The complaint of the United States differs dramatically from the complaints of the three intervening plaintiffs. The United States is the only plaintiff to seek an injunction under CERCLA §106. The United States does not raise any claims under the Minnesota Environmental Rights Act, as do intervening plaintiffs. The United States does not plead negligence, as the State of Minnesota, the City of St. Louis Park, and the City of Hopkins do. Rather, the United States claims injunctive relief and restitution under the strict liability principles incorporated into RCRA §7003 and CERCLA §§106(a), 107(a)(1)(A) & (2)(A). The United States does not seek relief for injury to natural resources under CERCLA §107(a)(1)(C) & (2)(C), as do the State, St. Louis Park and Hopkins.

If the United States' claims were tried to a jury, along with those of the State and the two cities, the potential for confusion between the United States' strict liability claims and the other plaintiffs' negligence claims would be great. Confusion could also result from trying the United State's claim for the recovery of the costs of remedial action alongside the State's, St. Louis Park's and Hopkins' claims for injury to natural resources. In both of there instances, there is an apparent similarity between the United States' claims and the claims of the intervening plaintiffs, but there are crucial differences which may be difficult for a jury untrained in the law to appreciate.

A further source of confusion is created by Reilly's principal affirmative defense. Reilly has claimed that the issues in this lawsuit were previously settled in an agreement between

Reilly, the State and St. Louis Park. Reilly further claims that it is protected from liability by virtue of a hold harmless agreement from St. Louis Park, which Reilly claims the State was a party to.

Based on the depositions to date, Reilly can be expected to call a number of witnesses in an effort to support these defenses. Although Reilly has recited these defenses in its answer to the complaint of the United States, Reilly has not alleged that the United States was a party to either the settlement or the hold harmless agreement. */ Moreover, CERCLA §107(e)(1), 42 U.S.C. §9607(e)(1), provides that a defendant is not relieved of liability to the United States by virtue of a hold harmless agreement. Thus, as a matter of law, these defenses are invalid against the United States. However, if Reilly were able to persuade a jury that the State and St. Louis Park were indeed bound by the settlement and hold harmless agreement, the jury may become confused about whether the United States is also bound. In addition, the invocation of the purported settlement and hold harmless agreement has engendered a series of counterclaims and cross-claims which do not involve the United States, but would provide another source of confusion for a jury.

In Ross v. Bernhard, supra, the Supreme Court stated that the court should consider, "the practical abilities and limitations of juries" in determining whether an issue was appropriate for jury resolution. 396 U.S. at 538 n. 10. Here, by submitting to the

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*/ The United States has moved for a judgment on the pleadings as to these defenses because Reilly has failed to allege that the United States was a party to the alleged settlement or hold harmless agreement.

jury the United States' solely equitable claims at the same time the jury is to consider the State's, St. Louis Park's and Hopkins' claims, including those for negligence and natural resource damages, and Reilly's defenses based on agreements to which Reilly does not allege that the United States was a party, would strain the practical abilities of the jury and breach their limitations. It would be much simpler for the claims of the United States to the court. Then the jury could more easily handle the claims of the State, St. Louis Park and Hopkins, who have filed very similar complaints. Also, Reilly's defenses that the State and St. Louis Park are bound by a settlement and hold harmless agreement could be considered by the jury without the possibility of confusion over the role of the United States.

If the claims of the United States were tried to the court, that would not necessitate a separate trial. It is not unheard of in cases involving more than two parties for certain claims to be tried to the court and others to a jury in the course of the same trial. This is a frequent event in cases involving claims brought under the Federal Tort Claims Act, ("FTCA"), 28 U.S.C. §2671 et. seq. Under the FTCA, a plaintiff suing the United States or one of its agencies has no right to a jury trial. However, the same plaintiff can sue a second private defendant or the United States may bring a third party action against a private party. In such cases, the private defendant or the third-party defendant may demand a jury trial, but the claims against the United States are resolved by the court. See, e.g., Wright v. United States, 80 F.R.D. 478 (D. Mont. 1978). The same principle, may be applied here with the case being tried at one time, but with the court's

resolving the United States' claims, while the jury resolves the intervening plaintiff's claims.

Finally, Reilly may suggest that the same jury which sits to hear the intervening plaintiffs' claims also sit as an advisory jury on the United States' claims under Rule 39(c) of the Federal Rules of Civil Procedure. Although the appointment of an advisory jury is within the court's discretion, we think that it would be ill-advised here. The same potential for confusion between the claims of the United States and those of the intervening plaintiffs would exist if the United States' claims were presented to an advisory jury as if these claims were presented to an actual jury, so the advisory jury would offer little assistance to the court. As Chief Judge Smith of the District of Montana put it, "calling an advisory jury ... creates more problems than it solves". Wright v. United States, supra, 80 F.R.D. at 480. */

Accordingly, trial to the court of the claims raised by the United States would promote an orderly resolution of the issues and substantially reduce the risk of confusion of issues in the minds of the jury.

CONCLUSION

For the foregoing reasons, the United States' motion to quash Reilly's demand for a jury trial should be granted and the

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*/ Chief Judge Smith cogently observed that

> "if the verdict [of an advisory jury] were consistant with my views, it would be of no assistance, and were it contrary, I would not know what effect to give it." Wright v. United States, supra, 80 F.R.D. at 479-80.

purely equitable claims raised by the United States against Reilly should be tried to the court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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